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ABSTRACT

This article analyses the practical importance of confidentiality and privilege in mediation with particular emphasis on issues of disclosure of what occurred in a mediation and compellability of mediators in any subsequent litigation. The piece focuses on the gap between the theory behind confidentiality in mediation – i.e. that it is largely assured in the process – and the reality in which the privacy of mediation, protected by and large by the general without prejudice rules, may be rendered far more porous in practice. The article suggests that mediation would benefit from the statutory development of rules pertaining to confidentiality that undergird the process itself and in this sense analyses two extant provisions that already apply in the UK in relation to cross border mediations, and family mediation in Scotland respectively which could provide a model for more general reform.

THE PRACTICAL SIGNIFICANCE OF CONFIDENTIALITY IN MEDIATION *

Introduction

Mediation may be described as ‘a flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution’.¹ So the process essentially aims to facilitate the continued negotiation between disputing parties in order to enable a mutually beneficial outcome to be reached. Mediation should, therefore, be viewed as a private law arrangement,² which aims to enable the parties to resolve their dispute, rather than the dispute being solved by the mediation itself.

Whilst it is certainly true that mediation as a forum of dispute settlement is not novel,³ but rather appears to have roots in the ancient world,⁴ modern practice has developed rapidly towards the end of the twentieth and early twenty first Centuries.⁵ This is no surprise. There are a number of potential benefits offered by the settling of disputes through mediation,⁶ at least as a precursor to traditional litigation. In this regard, mediation when successful has the potential to be not only cheaper,⁷ but also ‘less adversarial’⁸ than litigation. The cost savings appear to relate not only to the direct financial costs of proceedings, but also arise in terms of time costs which may be avoided by the settlement of disputes without the need to resort to court processes.⁹

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¹ Centre for Effective Dispute Resolution, ‘Glossary of Terms’ (nd) (np) available at http://www.cedr.com/about_us/library/glossary.php accessed 17/3/2016. This definition sets out a classic, facilitative and ‘norm generating’ form of mediation anticipated by most codes of practice – see Ellen Waldman, ‘Identifying the role of social norms in mediation: a multiple model approach’ (1997) *Hastings Law Journal* 48(4): 703-770

² G Blanke, ‘OECD Publishes Hearing Report on Arbitration and Competition’ (2013) *CGLR* 6(1) R9-R14, R11

³ D Roebuck, ‘The Myth of Modern Mediation’ (2007) *Arbitration* 73(1) 105-116, passim

⁴ RL Abel, ‘Mediation in Pre-Capitalist Societies’ (1983) *Windsor Yearbook of Access to Justice* 175-185, 181

⁵ P Brooker and A Lavers, ‘Commercial and Construction ADR: Lawyers’ Attitudes and Experience’ (2001) *CJQ* 20(Oct) 327-347, 327

⁶ P Brooker *Mediation Law: Journey Through Institutionalism to Juridification* (Routledge 2013) 9

⁷ E Carroll, ‘Are We Ready for ADR in Europe?’ (1989) *International Financial Law Review* 8 Part 12, 11

⁸ Brooker (n6) 9

⁹ A Brady, ‘Jackson Endorses the Benefits of Mediation in the Legal Process in England and Wales’ (2010) *Arbitration* 76(2) 251-264, 252

It has also been suggested that mediation offers parties the opportunity to settle disputes in a manner which may facilitate a continued commercial relationship,¹⁰ as opposed to traditional litigation which may render such a relationship if not impossible, exceedingly difficult.¹¹ The mediation process has thus been considered by some commentators to represent ‘human legal evolution’¹² in the sense that it enables parties to gain an understanding of the reasons leading to the dispute in order to lead to improved future relations. This so-called conflict theory claims then that mediation enables parties not only to understand better the *type* of conflict which has led to the dispute, but also to reach a mutually beneficial solution and in some cases, promote continued relations between the parties.¹³ Research would further suggest that settlements reached through mediation processes have the potential to be successful in the long term due to the fact that solutions are designed to be flexible and ‘generate a higher level of mutual satisfaction with outcomes’¹⁴ for the parties rather than rigid outcomes imposed by court¹⁵.

This notwithstanding, the ostensible benefits largely *do* rest upon mediation being successful and it is far from clear that mediation practice is indeed to be considered a generally successful operation.¹⁶ Although the flexibility of outcomes may certainly be considered a benefit, it may be the case that such flexibility stems from want of a cohesive governing framework relating to mediation practice, which in turn may create a number of potential difficulties,¹⁷ such as a lack of ‘predictable results’¹⁸ for disputing parties.

More generally, it has been argued that there is a gap between the theoretical ideal, which holds that mediation is an effective conflict resolution tool, and its practical success which may be achieved in any given dispute.¹⁹ There is much scholarly analysis of the various reasons for this, including suggestions that the success of mediation rests on the ability of the mediator in practice to remain impartial,²⁰ whether the narrowly defined parameters of the mediation in question²¹ are sufficient to allow the effective application of conflict theory, and the resulting capacity on the part

¹⁰ S Ruttle QC, ‘Mediation: A Social Antibody?’ (2013) *Arbitration* 79(3) 295-308, 295

¹¹ Brooker (n6) 10

¹² C Menkel-Meadow, ‘Chartered Institute of Arbitrators 8th Symposium on Mediation, October 2015: The Case for Mediation: The Things That Mediators Should Be Learning and Doing’ (2016) *Arbitration* 82(1) 22-33, 23

¹³ C Menkel-Meadow, ‘Conflict Theory’ in K Christensen and D Levison, *Encyclopedia of Community: From the Village to the Virtual World* (Second Edition, Sage Publications 2003) *passim*

¹⁴ S Goldberg and FEA Sanders, *Dispute Resolution: Negotiation, Mediation and Other Processes* (Sixth Edition, Aspen Publishers 2012) (Kindle Version np)

¹⁵ For some examples of the improved durability of mediation settlements as opposed to litigated outcomes see B Neimeijer and M Pel ‘Court based mediation in the Netherlands: research evaluation and future expectations’ (2005) *Penn State Law Review* 110 345-379, 363-364; M Ross and D Bain *In Court Mediation Pilots: report on evaluation of in court mediation schemes in Glasgow and Aberdeen Sheriff Courts* (Scottish Government 2010) at para 5.17.

¹⁶ A Gerami, ‘Bridging the Theory and Practice Gap: Mediator Power in Practice’ (2009) *Conflict Resolution Quarterly* 26(4) 433-451, 434-435. It should be recognized that success can be measured in numerous ways and is not exclusive to settlement. Partial settlement or the narrowing of issues in dispute post mediation is common. See for example, the evidence in relation to Scottish commercial mediation in B. Clark and C. Dawson, ‘ADR and Scottish Commercial Litigators: A Study of Attitudes and Experience’ (2007) *Civil Justice Quarterly* 26(Apr) 228-249 at 237

¹⁷ T Allen, *Mediation Law and Civil Practice* (Bloomsbury Professional 2013) vii

¹⁸ JG Bolton, *The Mediation Handbook: A Practical Guide for Lawyers and Participants in the Art of Mediation* (Second Edition, Create Space Independent Publishing Platform 2012) 8

¹⁹ Gerami (n16) 434-435

²⁰ O Cohen, N Dattner and A Luxenburg, ‘The Limits of the Mediator’s Neutrality’ (1999) *Mediation Quarterly* 16(4) 341-348, 341

²¹ LL Riskin, ‘Who Decides? Rethinking the Grid of Mediator Orientation’ (2003) *Dispute Resolution Magazine* 22(9) 23, *passim*

of the mediator to influence the parties to the dispute.²² While these all represent important issues, the aim of this article is to contribute to the understanding of the gap between mediation theory and practice in terms of mediation *confidentiality*. In terms of assessing the ability of mediators to 'provide security'²³ to disputing parties, and indeed to ensure that conflict theory can be applied in order to aid the parties understanding of that dispute and support the maintenance of continued relations²⁴, it must be observed that whilst mediation agreements are likely to contain confidentiality clauses,²⁵ such provisions are limited by the general position in the UK that confidentiality itself is not sufficient justification for the non-disclosure of documents in any subsequent litigation.²⁶ It is argued that in general there remains the potential that parties may fear that confidentiality is simply an illusion in mediation practice, thus contributing to the gap between what mediation is able to achieve in theory compared to in practice. There is, therefore, a need to examine the extent to which confidentiality *can* be achieved in mediation.

Against this backdrop the aims of this work as are as follows:

1. What is the significance of mediation confidentiality from a purely theoretical perspective, and are there any implications resulting from a lack of confidentiality that may arise in practice²⁷?
2. Has the lack of a consistent law pertaining to mediation had any implications for the question of confidentiality from a practical perspective and does the recent surge in English case law offer any useful guidance in this respect?
3. Has the lack of a coherent law relating to mediation practice had an impact on the ability of mediators and parties to ensure that confidentiality is respected not only in a particular mediation, but also in any subsequent litigation?
4. What is the likelihood of the success of implementation of any proposed reforms and what impact could this have upon mediation practice, in respect of confidentiality?

The focus on the work shall be primarily on general, civil non-family mediation in the UK although reference to mediation in family and cross border matters and in particular specific legislation pertaining to confidentiality in these contexts shall be made. The work begins by examining the importance of confidentiality in mediation. It will then consider the problems which may arise from a lack of confidentiality in disputes, and the circumstances which may give rise to such a lack of confidentiality. The article then proceeds to an evaluation of key case law in this context in order to highlight not only the importance of confidentiality in mediation, but also the implications of a failure to achieve it in reality. The work then presents suggestions for reform of the law in order to ensure that confidentiality in mediation, rather than being an ideal, is an achievable goal which

²² Gerami (n16) 434

²³ H Allen, 'Confidentiality: A Guide for Mediators' (2013) *ADR Times* 31, online edition, np, available at <http://www.cedr.com/articles/?item=Confidentiality-a-guide-for-mediators> accessed 15/3/2016

²⁴ Where relevant

²⁵ J Tumbridge, 'Mediators: Confidentiality and Compulsion to Give Evidence – Issues in England' (2010) *ICCLR* 21(4) 144-148, 145.

²⁶ *Earl of Malmesbury v Strutt & Parker* [2008] EWHC 424 (QB)

²⁷ This article focuses primarily on the issue of confidentiality as it relates to admissibility of evidence and mediator compellability in subsequent court proceedings. It does not deal with the related issue of what Alexander terms 'insider/insider' confidentiality – e.g. the mediator's duty not to disclose confidential information gleaned from one party in private session to the other party without consent – see Nadja Alexander, *The Mediation Manual: Hong Kong Edition* (1st, LexisNexis, 2014) at 382.

promotes the success of mediation processes. Here we also consider the necessary limitations to confidentiality that may occur in certain dispute settings particularly those arising in the context of the co-mingling of mediation with formal civil justice processes. The article will conclude by drawing together the arguments presented throughout the work.

The practical importance of confidentiality

The need for confidentiality in mediation is important for a number of theoretical reasons, most pertinently related to party perceptions about not only *who* is protected during the mediation process, but *how* such protection extends to disclosures made, and documents produced, during that process.²⁸ From the perspective of the parties, it is well established that in order for parties to disclose pertinent information to the mediator, including information which is 'critically important... in order to resolve the conflict',²⁹ those parties must feel confident that the mediator is bound to maintain confidentiality in respect of such disclosures.³⁰ Indeed, the issue may go beyond being simply a matter of trust in the process or facilitating the operation of that process, but also contain implications in terms of the role of the mediator. Mediation does not create a legally binding obligation to abide by any decisions reached during the process, but instead enables the parties to negotiate a mutually beneficial outcome, through the mediator.³¹ It has been suggested that where the mediator is not compelled to maintain confidentiality, but may disclose information received during a mediation to courts in the future settlement of any dispute, then the fundamental role of the mediator is altered from being a neutral third party who aims simply to facilitate a particular dispute between parties,³² to containing aspects akin to the role of a judge during litigation. It is true that the mere fact that a mediator may be compelled to disclose information in certain circumstances does not of *itself* lead to such a change in role, after all there is nothing to suggest that a simple disclosure may prevent a mediator from being impartial during the mediation itself.³³ However, it is also true that the *aim* of mediation is to facilitate the making of the decision by the *parties*,³⁴ and therefore it is argued that if a mediator is not bound by confidentiality and can be required to disclose information to a court which will subsequently enforce a decision on those parties, the mediator is acting, not to facilitate a negotiation, but to facilitate the imposition of a legally binding decision on those parties. On this basis, it is suggested that action which may undermine self-determination, here, the absence of confidentiality, may therefore, from the parties' perspective, prevent the mediator from being a neutral third party, thus rendering mediation a less attractive choice³⁵.

²⁸ K Kovach, 'The Evolution of Mediation in the United States: Issues Ripe for Regulation May Shape the Future of Practice' in N Alexander, *Global Trends in Mediation* (Second Edition, Kluwer International Publishing 2006) 439

²⁹ KS Hobbs, 'Mediation Confidentiality and Enforceable Settlements: Deal or No Deal?' (2007) (online version np) available at <http://www.mediate.com/articles/hobbsk1.cfm> accessed 24/3/2016

³⁰ *ibid*

³¹ Blanke (n2) R11

³² H Astor, 'Mediator Neutrality: Making Sense of Theory and Practice' (2007) *S&LS* 16(2) 221-239, *passim*

³³ SD Mau, 'Arbitration to Mediation with Arbitration to the Same Parties in the Same International Commercial Dispute Before the Same Neutral: Innovative Evolution or Recipe for Disaster' (2015) *Cons LJ* 31(3) 429-436, 434

³⁴ S Shipman, 'Compulsory Mediation: The Elephant in the Room' (2011) *CJQ* 30(2) 163-191, 171

³⁵ Of course it should be noted that in some circumstances parties may feel *de facto* bound to enter into mediation given the operation by courts of cost sanctions for 'unreasonable' refusals to mediate under the general mandate to manage cases effectively by way of Civil Procedural Rules, r 3.1. For some recent cases see *PGF II SA v OMFS Co* [2013] EWCA Civ 78; *Rolf v De Guerin* [2011] EWCA Civ 78. In view of the lack of choice in entering the process, it can be argued that the gap

Confidentiality: An Elusive Concept?

It should be noted that there is no accepted definition of confidentiality as it pertains to mediation, and it must therefore be asked whether there is any generally held consensus about what a confidential process comprises in this context. The starting point is to observe the comments of Bartlett who (in the context of English general civil mediation) has noted that confidentiality in mediation may pertain to 'contractual confidentiality, legal professional privilege and the related privilege arising from Without Prejudice negotiations'.³⁶ In other specific contexts mediation confidentiality may arise from specific legislative provisions which apply to the process³⁷.

As Tumbridge asserts, in terms of assessing the significance of confidentiality, one must ask whether the nature of that 'confidentiality is absolute'³⁸ or whether there are circumstances, such as in terms of subsequent litigation,³⁹ which may require disclosure. These circumstances will be considered further below but it should be observed here that it is clear that the nature of confidentiality in the mediation process may vary depending on the nature of the dispute in question and any subsequent litigation which may arise.⁴⁰ Whilst this appears to be somewhat axiomatic when one considers that mediation is inherently flexible and is simply a forum through which parties may negotiate their own solutions to a dispute,⁴¹ it is difficult to reconcile with the views of some commentators who have described the nature of confidentiality, in *all* disputes. In this regard, Brooker describes confidentiality in mediation as being one of the 'philosophical tenets'⁴² of the mediation process while Zamboni goes further and suggests that confidentiality is not only 'key to the successful practice of ADR procedures worldwide'⁴³ but is also one of the predominant reasons cited by parties for choosing mediation as their preferred mechanism of dispute settlement.⁴⁴ It is interesting to note that in this regard, Zamboni goes on to observe that confidentiality, rather than simply being a *feature* of mediation, is instead an inherent part of the process,⁴⁵ that process itself being flexible in order to enable the mutually beneficial solutions discussed above,⁴⁶ to be reached. If confidentiality is to be considered not separate to the process of mediation itself, but rather as an inherent part of a flexible process,⁴⁷ it seems reasonable to assume that confidentiality may operate with flexibility, and indeed have a different significance, depending on the nature of the particular dispute. This issue will be explored in more detail below. Here, it should simply be noted that at first glance the fact that confidentiality may be treated differently in different disputes may not of itself be problematic, but instead be considered as simply indicative of the arguments outlined above that the mediation process facilitates the flexible resolution of disputes by providing a forum which is able to meet the individual needs of the parties.⁴⁸ However, it is suggested here that this must be

between theory and practice in terms of mediation confidentiality has an even greater resonance in terms of fair treatment of the parties.

³⁶ M Bartlett, 'Mediation Secrets in the Shadow of the Law' (2015) *C/Q* 34(1) 112-126, 112-126, footnote 1

³⁷ Including in respect of EU cross border disputes and family mediation in Scotland. These are discussed below.

³⁸ Tumbridge (n25) 145

³⁹ *ibid*

⁴⁰ Bartlett (n36) 112

⁴¹ Blanke (n2) R11

⁴² Brooker (n6) 185

⁴³ M Zamboni, 'Confidentiality in Mediation' (2003) *Int ALR* 6(5) 175-190, 175

⁴⁴ *ibid*

⁴⁵ *ibid* at footnote 1

⁴⁶ Blanke (n2) R11

⁴⁷ Zamboni (n43) footnote 1

⁴⁸ Brooker (n6) 5-6

balanced by the need to ensure certainty and confidence in the process, and it can be argued that the lack of a definition about what a confidential mediation process entails or indeed when confidentiality will apply as part of that process, reduces certainty for the parties, and therefore may of itself undermine the likelihood of the process being considered successful.

Again, further discussion will be provided below, but first it is prudent to observe that notwithstanding that divergences in approaches towards, and beliefs about, the nature of confidentiality, the very fact that mediation is described as being a *confidential process* may mean that parties will be likely to anticipate that confidentiality will be achieved in that process.⁴⁹ As such, it is suggested that any lack of confidentiality, which will be shown below to result in practice, may not have a significant impact upon the parties' *choice* to use mediation, at least not initially⁵⁰. Rather, parties may believe that confidentiality will be ensured due to the process being described in theory as being confidential.⁵¹ This belief may be further bolstered by the drafting of a mediation contract between the parties and the mediator,⁵² although it will be shown below that the absence of such a contract does not of itself mean that the process is not confidential to one degree or another. Problems with confidentiality or lack thereof may, thus, only come to light after the initial mediation has taken place, and thus its importance in practice as a factor in parties choosing the process may be overstated. Although confidentiality is often cited as important to parties when choosing to continue negotiations through mediation, it is suggested that this is because of a belief and theoretical arguments that mediation is inherently a confidential process, and therefore the choice to enter mediation assumes that such confidentiality will be achieved.

One is, therefore, might argue that confidentiality, rather than simply being important in terms of *achieving* successful mediation processes, is such an inherent part of mediation itself, that if confidentiality cannot be achieved, then mediation properly so-called cannot be exercised, at least not successfully. Indeed as Soo observes, where 'issues are sensitive, involving senior management, disclosure of trade secrets or sensitive documents... confidentiality [is] a prime consideration'⁵³ and the increased need for such confidentiality may result in the failure of the particular mediation.⁵⁴ One does not seek to contend that such assertions are incorrect; it is certainly true that where information is particularly sensitive there may be an increased need not only for confidentiality, but for trust that the mediator and other party will maintain such confidentiality,⁵⁵ as part of the process itself. Rather, we would add that if the very *need* for a confidential process, rather than simply there being a *lack* of confidentiality in a particular instance, may be a contraindication for the use of mediation, this may undermine the ostensible benefits of mediation, as outlined in the introduction to this work.

⁴⁹ K Scott, 'Alternatives to Litigation: Part 1 – ADR and Mediation' (2014) *ELBLB* Apr 9-12, 9

⁵⁰ Except for repeat players who find that their expectations in this sense transpired to be unfounded

⁵¹ *ibid*

⁵² K Mackie, D Miles, W Marsh and T Allen, *ADR Practice Guide: Commercial Dispute Resolution* (Third Edition, Tottel Publishing 2007) 113

⁵³ G Soo, 'Working Through Unworkable Mediation' (2000) *Arbitration* 66(3) 207-210, 210

⁵⁴ *ibid*

⁵⁵ R Burnley and G Lascelles, 'Mediator Confidentiality: Conduct and Communications' (2004) *Arbitration* 70(1) 28-36, 28

Without Prejudice – The Privilege

As noted above parties may believe that the nature of the proceedings will be confidential on the basis of the mediation contract drafted between them and the mediator.⁵⁶ Of course any apparent protection this may offer to the parties must be balanced by the notion that ‘generally speaking confidentiality is not a bar to disclosure of documents or information in the process of litigation, but the court will only compel such disclosure if it considers it necessary for the fair disposal of the case’.⁵⁷ Indeed, one may state such a position as being objectively certain in the context of English civil mediation due to the fact that it has been endorsed by the judiciary in *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No2)*,⁵⁸ in which Ramsey J held that the parties own agreement as to confidentiality will not be the deciding factor in whether information received during a mediation *will in fact* be considered confidential.⁵⁹

In practice, the requirement of confidentiality in mediation may be covered through the operation of the Without Prejudice rules.⁶⁰ These rules must be distinguished from rules relating to confidentiality *per se*. As Brooker observes, ‘although mediation is often endorsed on the grounds of its confidentiality, legal protection for the statements in mediation in common law countries has been for the most part through an application of the Without Prejudice rules’.⁶¹ Therefore, although the operation of the Without Prejudice rules may effectively render information disclosed in a mediation confidential, this does not mean that Without Prejudice rules should be considered synonymous with information being confidential, but rather that they operate to encourage parties in dispute to speak candidly with a view to reaching settlement in then knowledge that their disclosures will not be used against them in any later court proceedings. The parties can and often do declare that disclosures will be protected by the Without Prejudice rules in the mediation contract, but in the absence of such a clause, the rules may still operate according to the common law test, which will be discussed shortly.⁶² However, it is submitted that whilst this appears to confirm the effective confidentiality of the mediation process, in form if not in name, it should also be noted that even where the parties have declared that the Without Prejudice rules apply, if it is later shown that the test has not been fulfilled, the wording of the contract may effectively be meaningless. Again, it is argued that this represents the confusion which may surround the law of confidentiality as it relates to mediation, as parties cannot rely on the wording of the mediation contract in order to be certain that confidentiality will apply.

This problem notwithstanding, where the Without Prejudice rules *do* apply, the parties may be certain that disclosures will not be able to be used in any subsequent litigation, and may thus seem to be a confirmation of the benefits of mediation as a means of negotiating a settlement, in terms of enabling parties to reach an agreement which will facilitate a continued relationship without the

⁵⁶ Soo (n53) 210. Confidentiality clauses are of course commonplace in commercial mediation agreements. See for example, the CEDR Model Mediation Agreement (2016) available at <http://uk.practicallaw.com/0-584-6305>

⁵⁷ C Phipps and R Toulson, *Confidentiality* (Second Edition, Sweet & Maxwell 2006) 17-016

⁵⁸ *Farm Assist Ltd (In Liquidation) v The Secretary of State for the Environment, Food and Rural Affairs (No2)* [2009] EWHC 1102 per Ramsey J at [21]

⁵⁹ *ibid*

⁶⁰ Phipps and Toulson (n57) 17-016

⁶¹ Brooker (n6) 187

⁶² *ibid*

concern that disclosures may be used in litigation.⁶³ Indeed, one may be inclined to take such an argument further and observe that if mediation *is* successful as a result of the confidential nature of proceedings, albeit under the Without Prejudice rules, there will be no need for litigation and thus, theoretically at least, the issues with a lack of confidentiality⁶⁴ may not arise. Support for such an argument may be taken from the assertions of Oliver LJ in *Cutts v Head*,⁶⁵ in which he observed that, 'parties should be encouraged as far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations could be used to their prejudice in the course of the proceedings'.⁶⁶ It seems to us that it is only a logical extension of such assertions to observe that where proceedings are not confidential, and thus as shown above, less likely to be successful, disclosures may be revealed in future litigation, and therefore lead to the position where parties do not choose mediation as a dispute settlement forum. We do recognise that such arguments are somewhat circular in nature, but it is argued that this demonstrates the inherent problems with confidentiality in mediation: its operation is surrounded with uncertainty and confusion⁶⁷ which may in turn undermine the very nature of mediation as a means of dispute settlement.

It is clear from the decision in *Rush and Tompkins Ltd v Greater London Council*,⁶⁸ the facts of which are not important for the discussion here, that the Without Prejudice rules will be applicable in mediation as a matter of public policy in terms of encouraging parties to settle disputes without litigation,⁶⁹ thus confirming the principle outlined in *Cutts v Head*, above. The limitations of these rules are laid bare here, however. It was made clear in *Rush* that the question of whether disclosures will actually be considered Without Prejudice rests not on the assertions of the parties, but instead on the considerations of whether the particular disclosures were made in a genuine attempt to reach a settlement, rather than mere disclosures which happened to be made during the process of a mediation.⁷⁰ As Lord Griffiths held, if it is clear from the surrounding circumstances that the parties were seeking to compromise an action, then the content of those negotiations⁷¹ will not be admissible. Implicit in this statement, however, is that where it is clear that the negotiations were not part of such a 'genuine'⁷² attempt to resolve the dispute, the Without Prejudice rules will not apply and any disclosures will consequently not be confidential.⁷³

So it may be that parties will not be certain before making any disclosures how those disclosures will subsequently be treated. It is argued that this position introduces a further element of confusion into the process: in order to determine whether a communication should be protected by privilege in such a circumstance, it will inevitably be necessary to consider whether the communication was indeed a genuine attempt to settle the dispute or whether it was simply an admission of fact or part

⁶³ JA Fry, 'Without Prejudice and Confidential Communications in International Arbitration (When Does Procedural Flexibility Erode Public Policy?)' (1998) *Int ALR* 1(6) 209-213, 211

⁶⁴ At least in respect of admissibility as evidence in court

⁶⁵ *Cutts v Head* [1984] Ch 290

⁶⁶ *ibid* at [306]

⁶⁷ PN Thompson, 'Confidentiality, Competence and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota' (1997) *Hamline Journal of Public Law and Policy* 18 329, 330

⁶⁸ *Rush and Tompkins Ltd v Greater London Council* [1989] AC 1280

⁶⁹ *ibid* per Lord Griffiths at [1299]

⁷⁰ *ibid*

⁷¹ *ibid*

⁷² *ibid* at [1305]

⁷³ A recent case in which the Court of Appeal supported a broader interpretation of what is meant by a 'genuine' attempt to settle *Suh v Mace (UK) Limited* [2016] EWCA Civ 4.

of an open discussion within a mediation. It seems to us that such a determination could only be made by a court, and that in order to avoid the somewhat circular situation whereby the court must consider the content of the communication in order to consider the disclosure, an objective view must be taken of the circumstances in which the communication was made.⁷⁴ It is, therefore, submitted that the confidentiality of mediation appears to be comprehensive only where the outcome of mediation is successful and there is no need for further disputes pertaining to whether disclosures made during the process should be admissible in subsequent litigation. Further, whilst it may indeed be the case that such decisions pertaining to admissibility remain procedural issues, and do not undermine the confidentiality of discussions within a mediation unless it is determined that such disclosures should be admissible, it is submitted that the mere making of such determinations will involve a significant cost. This may, therefore, undermine one of the supposed benefits of mediation: significantly reduced costs when compared to traditional litigation.⁷⁵

Privilege: Scope and Exceptions. Undermining Parties' Expectations?

A related question relates to the *scope* of the Without Prejudice privilege. It is clear from the decision in *Unilever v The Procter and Gamble*⁷⁶ that the scope of the privilege is very wide and indeed commentators in the past observed that this may prevent the problem, described above, whereby a court will be required to undertake an examination of the mediation proceedings and any disclosures in order to determine the nature of those disclosures.⁷⁷ As Willoughby has observed, if the scope of the Without Prejudice rule were not to be considered widely, parties may feel uncertain as to the scope of the protection they would receive under it, and thus the public policy of encouraging negotiations, as expressed in *Cutts v Head*, would be undermined.⁷⁸ Indeed, this would lead to 'immense practical difficulties (such as that settlement discussions would have to be unrealistically guarded)'.⁷⁹

This notwithstanding, leaving aside the issue of whether a particular disclosure is viewed as part of a genuine attempt to settle or not, there are a number of recognised exceptions to the application of the Without Prejudice rules, and it must therefore be asked whether the very existence of such exceptions may lead to problems in terms of either the parties' choice to mediate, or to circumstances in which a party may find itself unwittingly exposed. These exceptions have been articulated most notably in *Unilever*, although it should be noted that the facts of *Unilever* related specifically to whether the Without Prejudice rules could apply not only to disclosures which might unfavourably influence the position of one of the parties, but also to threats made by one party to bring litigious proceedings against the other in the absence of a successful mediation.⁸⁰ The threats made in this case should be distinguished from a mere assertion that although the attempt to solve the dispute through mediation was genuine, that party would still rely on their rights to access court to seek a resolution; instead the threats to bring such an action in this case appeared to be contrary to section 70(1) of the Patents Act 1977.⁸¹ This section provides that, 'where a person by circulars,

⁷⁴ T Allen, 'Implementing the EU Directive on Mediation' (2008) *CEDR* (online version np)

⁷⁵ Brooker (n6) 9

⁷⁶ *Unilever v The Procter and Gamble* [2000] WLR 2436

⁷⁷ R Willoughby, 'Without Prejudice Discussions, Patents Threats and the Right to Intervene in Opposition Proceedings' (2000) *European Intellectual Property Review* 22(8) 373-376, 374

⁷⁸ *ibid*

⁷⁹ *ibid*

⁸⁰ *Unilever* (n92) per Robert Walker LJ at [2437]-[2438]

⁸¹ Section 70(1) Patents Act 1977

advertisements or otherwise, threatens another person with proceedings for any infringements of a patent [that person] may [subject to certain conditions] bring proceedings in the courts against the person making the threats'.⁸² Although accepting that there was a distinction between statements made contrary to the Act and general statements protected by the Without Prejudice rule, which may be an admission as to one party's conduct and may be harmful to that party in any subsequent litigation, it was held to *make* such a distinction would lead to uncertainty about the scope of the privilege, and thus undermine the public policy of ensuring that parties to a mediation could make unguarded disclosures with a view to reaching a mutually beneficial settlement.⁸³ This would appear to support the proposition that the Privilege is wide and operates to ensure confidentiality to parties in mediation.

Nonetheless, Robert Walker LJ did go on to observe that a number of exceptions to the principle *do* exist. It was held that where there is doubt over whether an agreement has been reached, disclosure is permissible.⁸⁴ Disclosure may also occur in cases of misrepresentation, fraud, undue influence,⁸⁵ estoppel⁸⁶ or where there has been 'unambiguous impropriety'.⁸⁷ Disclosures may also be made to explain delay,⁸⁸ to provide evidence as to whether a 'claimant has acted reasonably as to his loss in conduct'⁸⁹ or in making an assessment of costs.⁹⁰ Although this list is rather extensive, suggesting at first glance that this spate of caveats may undermine the public policy of ensuring that parties are able to make full disclosures, not only are the exceptions clear and defined, but it can be argued they all relate to some form of impropriety which it would be unconscionable to protect. As such, it is suggested that the *Unilever* exceptions, rather than undermining the scope of the Without Prejudice rules, and therefore constituting a circumstance in which mediating parties may face issues with confidentiality, are simply an example of the judicial system not permitting parties to use the law to promote their own misdeeds.⁹¹

As a final point here, it should be noted that as Mr Justice Briggs has observed, there is some doubt as to whether the privilege operates strictly for any purposes but subject to the above exceptions, or whether it should be viewed a more of limited principle subject to further exception 'protecting statements made without prejudice from being used as admissions of the truth of what is stated'.⁹² Whilst it is true that there is some authority for the latter position, as may be found in *Muller v Linsley & Mortimer*,⁹³ the decision in *Unliver* was approved in *Ofulue v Bossert*.⁹⁴ As Lord Neuberger observed, not only would it be 'inappropriate to create further exceptions',⁹⁵ but what is required is a practical approach whereby the Without Prejudice rules should always apply unless the disclosures

⁸² *ibid*

⁸³ *Unilever* (n79) per Robert Walker LJ at [2442]

⁸⁴ *ibid* at [2444]

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ *ibid* at [2445]

⁸⁹ *ibid*

⁹⁰ *ibid*

⁹¹ OJ Herstein, 'A Normative Theory of the Clean Hands Defense' (2011) *Cornell University Law School Publications* 1-139, 1, available at <http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1209&context=facpub> accessed 26/3/2016

⁹² Mr Justice M Briggs, 'Mediation Privilege: Part 1' (2009) *NLJ* 159(7363) 506-507, (online version np)

⁹³ *Muller v Linsley & Mortimer* [1996] PNLR 74

⁹⁴ *Ofulue v Bossert* [2009] 2 ALL ER(D) 119

⁹⁵ *ibid* per Lord Neuberger at [98]

were 'wholly unconnected with the parties'.⁹⁶ It is argued that this confirms the need for certainty in the application of the privilege and confirms that parties will be protected from disclosures, thus maintaining confidentiality of mediation, even if that confidentiality is secured by the operation of the Without Prejudice rules, rather than confidentiality *per se* as contained in the mediation contract.

It has been shown above that although confidentiality in mediation is an inherent part of the process, it is a concept ripe with confusion and uncertainty. Although this may seem to undermine the parties' contractual provisions regarding confidentiality the Without Prejudice rules may operate as something akin to a saviour of the concept. It does seem that the scope of these rules is rather wide, and that this may prevent problems which may arise if parties are unsure whether their disclosures are protected. As such, parties may still be encouraged to choose mediation as a forum in which to settle their disputes. So whilst confidentiality itself may be an elusive concept, in theory at least, privacy may be protected through the Without Prejudice Privilege. Whilst in *theory*, this does not appear to cause problems for parties in terms of their need to make full and frank disclosures during mediations which lead to the successful outcome of those processes, one must ask therefore whether a lack of confidentiality in mediation may still cause problems in *practice*.

The Practical Application of the Without Prejudice Rules in mediation

While there have been a spate of recent cases in England in which exceptions to the without prejudice privilege in mediation have been seen to take effect⁹⁷ here we focus on the practical difficulties that may arise in practice with operation of the Without Prejudice rules in mediation, in cases concerning documents produced ostensibly for the purposes of mediation rather than in terms of mere disclosures.⁹⁸ The starting point here is to consider *Aird v Prime Meridian*.⁹⁹ Briefly, the case involved proceedings related to the construction of a house, during which the parties were referred to mediation.¹⁰⁰ The mediation was not successful, and upon the recommencement of proceedings, the defendants sought to include the joint statements of experts which had been used as part of the mediation.¹⁰¹ The claimants asserted that such statements were covered by privilege as part of the confidential nature of mediation, and were thus inadmissible.¹⁰² At first instance, it was held that the expert statements were privileged for all purposes notwithstanding the fact that they were produced pursuant to Rule 35.12(3) of the Civil Procedure Rules.¹⁰³ It should be observed that the decision took place in the context of a mediation which occurred during the litigation, and indeed Judge Coulson asserted that it was typical of the problems which may occur when these processes

⁹⁶ *ibid*

⁹⁷ Where both parties waived their privilege to what occurred in mediation the court in *Earl of Malmesbury v Strutt and Parker* [2008] EWHC 424 (QB) held that where a party acted in an unreasonable fashion in the mediation that party may be penalised in respect of cost sanctions. In *Farm Assist Limited (in liquidation) v The Secretary of State for Environment, Food and Rural Affairs (No. 2)* 2009 EWHC 1102 (TCC), again where both parties waived their privilege, in a case of a settlement agreed under alleged duress the mediator was compelled to give evidence as the conduct of the parties at the mediation despite a non-compellability clause to the contrary. In *Cattley v Pollard* 2007 Ch 353, parties to mediation were ordered to disclose to the court certain documents furnished in the course of mediation discussions to allow the court to assess the level of damages in a subsequent case. Finally, in *Brown v Patel* [2007] EWHC 625 the court allowed evidence of parties' conduct at a mediation to ascertain if the case had settled or not.

⁹⁸ T Blacker, 'The Boomerang Effect' (2007) *Building* 26 69, *passim*

⁹⁹ *Aird v Prime Meridian* [2006] EWHC 2338

¹⁰⁰ *ibid* per HH Judge Peter Coulson QC at [3]

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ Rule 35.12(3) of the Civil Procedure Rules (Current version in force since 2009)

become intertwined: he argued that this may lead to ‘disputes over the extent and effect of the orders of the court’,¹⁰⁴ and thus lead to confusion between the extent to which documents used during the mediation process are in fact confidential. However, reversing the decision in the Court of Appeal,¹⁰⁵ May LJ observed that where documents ‘were obviously produced for other purposes, which were needed for and produced at the mediation’,¹⁰⁶ confidentiality would not apply. He went on to observe that ‘documents provided for mediation are normally privileged and that privilege should not be waived or otherwise lost, other than in clear or unequivocal circumstances’¹⁰⁷ but argued that these circumstances were fulfilled because the documents were clearly produced under Rule 35.12(3), even though those documents were additionally available during the mediation.¹⁰⁸ He continued that the question to be considered is not whether originally privileged documents could have that privilege removed, and thus become admissible in litigation, but whether the documents were in fact privileged in the first place.¹⁰⁹ Judge Coulson, at first instance,¹¹⁰ was wrong in this respect¹¹¹ and the decision was overturned.

While we do not seek to contend that May LJ was misguided in terms of his analysis of the nature of the Privilege; it would indeed be nonsensical to assert that non-Privileged documents could simply become Privileged due to the fact that they were subsequently used in mediation; it is argued that the result of the Court of Appeal decision is problematic in terms of the practical significance of confidentiality in mediation. Whilst it was true that the Court in *Aird*, *had* ordered the statements to be produced,¹¹² and they were not thus disclosures of the type normally made in mediation, the parties were instructed to undertake mediation as part of the litigation process and in doing this, the parties believed that such a process was confidential. It has been argued, therefore, that the fact that the statements had been produced under orders of the court, and thus not directly as part of the mediation should be irrelevant.¹¹³ The fact remains that the parties were instructed to undertake a confidential process in order that they may reach a mutually beneficial solution,¹¹⁴ and it therefore seems contrary to the public policy to encourage candour in negotiations to assert that documents used as part of that process, could subsequently be used in litigation. It is, therefore, argued that May LJ’s assertions, whilst technically correct, focus rather too much on the technical origins of the statements,¹¹⁵ rather than considering the public policy reasons behind the decision to refer parties to mediation.¹¹⁶ It is further suggested that this demonstrates that there is a clear gap between the public policy assertions in *Unilever*¹¹⁷ and indeed the ostensibly wide scope of the Without Prejudice rules averred in that case, and the practical application of those rules when related to the production of documents which are used in mediation.

¹⁰⁴ *Aird* (n99) per HH Judge Peter Coulson QC at [1]

¹⁰⁵ *Aird v Prime Meridian* [2006] EWCA Civ 1866

¹⁰⁶ *ibid* per May LJ at [5]

¹⁰⁷ *ibid* at [21]

¹⁰⁸ *ibid* at [24]

¹⁰⁹ *ibid* at [29] and [34]

¹¹⁰ *Aird* (99) per Coulson J at [36]

¹¹¹ *Aird* (n105) per May LJ at [29]

¹¹² *Aird* (n99) per HH Judge Peter Coulson at [2]

¹¹³ Editor, ‘ADR: Without Prejudice Privilege in Mediation’ (2007) *ARB LM* Apr 10-12, *passim*

¹¹⁴ *Aird* (n99) per HH Judge Coulson QC at [1]-[5]

¹¹⁵ Editor, ‘Case Comment: Discussion Between Experts and Mediation’ (2007) *CPN* 2(Feb)7, 7

¹¹⁶ HR Dundas, ‘When Does Confidential Mean Confidential? An Important Development in the Law of Mediation and the Without Prejudice Rules’ (2007) *Arbitration* 73(3) 335-341, 337

¹¹⁷ *Unilever* (n76)

Whether the law requires reform in this regard will be considered further below. Here, however, it is argued that in view of the decision in *Aird*, it is difficult to accept the assertions of Mackie and his colleagues, who note that the Court of Appeal decision should ‘make no difference to the fundamentals of mediation confidentiality’¹¹⁸ but rather applies only to documents not produced specifically for the mediation itself.¹¹⁹ Again, it is argued that this is a mere technical point which fails to consider the public policy reasoning behind encouraging parties to seek to resolve disputes through mediation, and thus undermines the operation of confidentiality. It is conceded however, that the authors are correct that the mere fact that documents are produced ‘for the first time’¹²⁰ during a mediation, should not prevent those documents from being available to a judge under the Rule 35.12(3) of the Civil Procedure Rules¹²¹ in any subsequent litigation; to hold otherwise may simply render mediation a means by which parties could avoid documents detrimental to their own case being available to a judge, but it is argued that this should fall under one of the *Unilever* exceptions rather than being the general position. In any event, not only was it recorded in the agreement that ‘otherwise admissible evidence would not become inadmissible simply because it was used in mediation’¹²² but even if that were not the case, such unconscionable behaviour would, as Altaras notes, lead to a forfeit of the operation of the principle of privilege anyway,¹²³ and thus it is argued that such attempts to influence the outcome of future litigation are unlikely to occur in practice.

However, the fact that this is indeed the case, it is argued, has no bearing on the question of whether the decision has altered the facets of mediation and confidentiality, as Mackie and his colleagues suggest.¹²⁴ Rather, it is suggested, it demonstrates that mediation confidentiality is not absolute but applies in a varying manner according to the specific circumstances of a case. Indeed, support for this may be taken from the assertions of Mildred, who argues that the guidance which should be taken by practitioners following *Aird* is that in order to ensure that parties understand the nature of confidentiality as applies to their agreement, care should be taken to ensure that ‘work done by experts for the purpose of mediation to which privilege or *without prejudice* applies, [is] kept entirely separate from joint statements’¹²⁵ produced under the CPR. At first glance, this does appear a rather sensible conclusion and indeed it is accepted that if parties *understand* the nature of all documents prepared for or *used* during the mediation, then such an approach would ensure clarity in terms of the nature of confidentiality: non-privileged documents should be treated separately to privileged documents.¹²⁶ However, we would argue that this fails to recognise the very circumstances in which the ostensible lack of confidentiality arose in *Aird*, namely that there was a ‘muddle’¹²⁷ over the very *nature* of the documents and whether the privilege applied to those documents, and also that in practice, if a court orders parties to undertake mediation as part of

¹¹⁸ Mackie et al (n52) 118

¹¹⁹ *ibid*

¹²⁰ *ibid*

¹²¹ Rule 35.12(3) of the Civil Procedure Rules (Current version in force since 2009)

¹²² Editor, ‘*Aird v Prime Meridian: Case Comment*’ (2006) *Litigation in Practice* (np) available at <http://swarb.co.uk/aird-and-another-v-prime-meridian-ltd-ca-21-dec-2006/> accessed 17/3/2016

¹²³ D Altaras, ‘The Without Prejudice Rule in England’ (2010) *Arbitration* 76(3) 474-487, 474

¹²⁴ Mackie et al (n52) 118

¹²⁵ M Mildred, ‘Case Comment – Civil Procedure – Expert Evidence – Mediation’ (2007) *JPI Law* 2 C78-C80, C80

¹²⁶ Editor (n122) 7

¹²⁷ *Aird* (n105) per May LJ at [21]

litigious proceedings, it seems impractical to suggest that *all* documents will be able to be kept separately as Mildred encourages.¹²⁸

Bartlett observes that one should be careful not to conflate issues of confidentiality with the question of privilege, as the mere fact that information, whether in document form or otherwise, is confidential does not preclude it from being admissible in court and that ‘privilege offers far stronger against disclosure than confidentiality’.¹²⁹ We do not seek to contend the truth of such an assertion; rather, it is suggested that privilege, as noted above, simply refers to the status of documents which may be used in a mediation and does not refer to all confidential *information* and that as such, this may lead to circumstances in which parties believe the process is more confidential than it actually appears to be. As Bartlett observes, contractual confidentiality ‘does not itself provide a shield against a witness summons or determine the issue of admissibility’.¹³⁰ In this sense, it is suggested that the *belief* that a confidential process protects a party from information revealed during a mediation from being revealed in court, when in fact circumstances may arise where that information is able to be revealed in litigation, illustrates a gap between the theory and the practical application of mediation confidentiality, and may thus undermine its practical significance. Possible reform in this regard will be considered in the following section.

Options for Reform

It has been shown throughout this article that confidentiality is of paramount practical significance in a mediation process. It has been asserted that notwithstanding the fact that mediation is considered to be an inherently confidential process,¹³¹ such confidentiality generally arises in the context of the operation of the Without Prejudice rules, rather than as a result of any rules relating to confidentiality *per se*. It was shown above that notwithstanding the theoretical limitations to these rules being narrow, and thus appearing to protect the confidentiality of parties to a mediation, supporting the public policy of encouraging full disclosures during the mediation process, in practice the Without Prejudice rules do not always apply in mediation,¹³² leading to confusion as to the extent of mediation confidentiality and perhaps creating a disincentive for parties to choose to enter mediation. Even if the without prejudice rules were to be modified further in their operation within mediation to provide further clarity as to when they might apply we would suggest that this would not solve the problems with confidentiality as demonstrated throughout this work. As has been observed throughout, mediation is described as a confidential process rather than a process to which the Without Prejudice rules apply, and thus the latter simply serves to secure confidentiality in the process; it does not create a mediation process which is confidential of itself.¹³³ So greater certainty in operation of the Without Prejudice rules would have no application to the gap between theory and practice in terms of the drafting of confidentiality clauses in mediation contracts, or impact upon parties’ apparently misguided belief that it is the mediation process which is confidential¹³⁴ rather than the application of the Without Prejudice rules to that process. Of course, one may be inclined to suggest here that we require a new approach to mediation practice, whereby

¹²⁸ Mildred (n125) C80

¹²⁹ *ibid* at 113

¹³⁰ *ibid* at 114

¹³¹ Zamboni (n43) footnote 1

¹³² Aird (n105)

¹³³ Brooker (n6) 187

¹³⁴ M Kenton and J Cundy, ‘Mediation Agreements No Guarantee of Privacy’ (2009) *LLID* Nov 20 7, 7

mediators would be required to make it clear to parties that in practice confidentiality – in so far as it relates to disclosures of what took place in mediation in any consequent litigation - would be secured through the operation of the Without Prejudice rules, but this offers a clumsy solution difficult to articulate to would-be participants and sits rather uneasily with the current understanding of mediation as being an inherently confidential process.¹³⁵

A mediator's privilege?

To clarify matters, some commentators have averred that a privilege should be created, which applies specifically to mediators.¹³⁶ This, Kallipetis has argued, should operate in the similar manner to the absolute privilege which applies to information divulged by client to legal representative.¹³⁷ Such a privilege, it is contended, bolstered by use of the term in mediation contracts, could be developed as a matter of the common law requiring no statutory intervention¹³⁸. Whilst this would certainly ensure that any information provided to the mediator would remain confidential and that this may apply to *any* disclosures made or documents produced at mediation, thus seeming to address many of the concerns raised in this article, we would raise a note of caution. The role of the mediator is to act as a *neutral* third party. It has been argued that if the mediator's role is altered through the development of a professional privilege akin to that applying to lawyers,¹³⁹ then such neutrality will be difficult to maintain and parties may, thus, envisage mediators to be acting for them as an advocate, rather than simply facilitating the settlement of disputes between the parties.

Specific legislative provisions governing confidentiality and privilege

In order to avoid such problems, and in particular to recognise the active role of parties in the process, an alternative approach is that confidentiality in mediation be protected in its own right through specific legislative provisions.¹⁴⁰ This method has the obvious advantage that it does what it says on the tin – as is commonly described, confidentiality attaches to the mediation process itself. We would note that while ascribing confidentiality in this way to mediation is more straightforward and can lead to greater certainty in mediation, it potentially suffers from definitional and interpretive problems, thus not removing all ambiguity. Such difficulties may arise in a number of ways. First, it must be clear in any specific confidentiality provision as to what kind of mediation conducted by which mediators, is covered thereby. Where a provision relates to, for example, referral emanating from the direction of a court or falls within the confines of a particular statutory scheme then there may be little difficulty identifying when that measure applies or not but the situation is not so clear cut in respect of the wide panoply of mediation practice generally. A second matter that may militate against certainty pertains to the exceptions to the provisions relative to privilege which may be spelt out in any specific measure. In this sense, it is interesting to note that whilst the discussion throughout this work has argued that the scope of the Without Prejudice privilege should be wide enough to ensure that parties can make disclosures during a mediation process without needing to be guarded about the content of those disclosures, in case of them not

¹³⁵ Carroll (n7) 11

¹³⁶ F Colquhoun, W Wood and C Arnall, 'ADR: Round 2' (2005) *IHL* 131(Jun) 26, 28-30, 28

¹³⁷ M Kallipetis, 'Mediation Privilege and Confidentiality and the EU Directive' in G Pointon, *ADR in Business; Practice and Issues Across Countries and Cultures* (Kluwer Law International 2011) 188

¹³⁸ M Kallipetis 'Mediation Privilege' Mediator Magazine, available at <http://billwoodmediation.com/articles/privilege.pdf> at 5

¹³⁹ N van Dokkum, 'Mediation Privilege: What Are We Talking About?' (2012) *ILT* 30(16 235-241, abstract

¹⁴⁰ C Wells, 'EU Common Agreement' (2008) *Legal Week* 10(24) 16, 16

being confidential in any subsequent litigation, Thompson suggests that legislation defining the scope of mediation confidentiality would have the additional benefit of being able to *limit* the scope of confidentiality as secured.¹⁴¹ He argues that the ‘scope of confidentiality must not be broader than necessary to protect the legitimate interests’¹⁴² of mediating parties and that legislation defining the operation of such rules in the context of mediation could be used to *narrow* its application rather than simply to provide certainty.¹⁴³ There may be some merit in such arguments: it was noted earlier in the work for example, that it would be unconscionable to allow parties to rely on confidentiality to gain an unfair advantage in subsequent litigation or to exercise other unconscionable behaviour. It was shown though that such problems are mitigated not simply by the *Unilever* exceptions but also by the general operation of English civil procedure, which does not allow a party to use the law to further impropriety.¹⁴⁴ Moreover, in the context of the co-mingling of mediation with formal civil justice processes, particularly those involving *pro se* litigants, through court-annexed mediation programmes, the justifications for rendering the process *more* porous may be compelling. This, for example, may be so “to ensure that parties are not pressured into settlement or dealt with unfairly within the process” or to guard against tactical abuse of the process by parties pressured into mediation use.¹⁴⁵

Current UK statutory provisions

By using two extant provisions – those applying to family mediation in Scotland and those relative to UK cross border disputes– we analyse below how such issues applying to mediation practice generally may be resolved in practice¹⁴⁶. This first example is the confidentiality in mediation emanating from the 2008 European Mediation Directive.¹⁴⁷ Whilst the Directive has now been implemented into UK law,¹⁴⁸ it must be observed that it applies only to cross-border mediations and does not form part of the law in the UK in respect of domestic mediations.¹⁴⁹ The Directive requires that a mediator or anyone involved in the administration of mediation shall not be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process¹⁵⁰ subject to narrow exceptions of public policy.¹⁵¹ Examples of such exceptions are spelt out in the Directive including matters pertaining to child protection issues and protection from physical or psychological harm. The language of the Directive is broadly replicated in the empowering legislation which brings the provision into English law. The legislation provides that “9. Subject to regulation 10, a mediator or a mediation administrator has the right to withhold mediation evidence in civil and commercial judicial proceedings and arbitration. 10. A court may order that a mediator or a mediation administrator must give or disclose mediation evidence where— (a)all parties to the mediation agree to the giving or disclosure

¹⁴¹ Thompson (n67) 356

¹⁴² *ibid*

¹⁴³ *ibid*

¹⁴⁴ Herstein (n91) 1

¹⁴⁵ B. Clark *Lawyers and Mediation* (2012) at para 5.3.2

¹⁴⁶ There are of course other approaches internationally, such as the rather broad blanket of confidentiality assured by the sections 1115 to 1128 of the California Evidence Code and more nuanced approach of the US National Conference of Commissions on Uniform State Laws developed Uniform Mediation Act 2001.

¹⁴⁷ For England and Wales, Mediation Directive 2008/52/EC, article 7

¹⁴⁸ Cross Border Mediation (EU Directive) Regulation 2011.

¹⁴⁹ G Blanke, ‘The Mediation Directive – What Will It Mean For Us?’ (2008) *Arbitration* 4(4) 441-443, *passim*

¹⁵⁰ Article 7(1) Mediation Directive

¹⁵¹ *ibid* at Article 7(1)(a) and (b)

of the mediation evidence; (b) the giving or disclosure of the mediation evidence is necessary for overriding considerations of public policy, in accordance with article 7(1)(a) of the Mediation Directive; or (c) the mediation evidence relates to the mediation settlement, and the giving or disclosure of the mediation settlement is necessary to implement or enforce the mediation settlement agreement”¹⁵².

While the focus of the Directive is on mediator *compellability*, the way that the rules have been brought into the Civil Procedural Rules¹⁵³ crucially also encompass the admissibility of documents used in the mediation under the control of the mediator, and do not simply apply to disclosures made to the mediator by parties. It is submitted that this approach, if it were adopted more generally to mediation, would help ensure that problems in cases such as *Aird* do not arise. Indeed, one is therefore inclined to agree with the assertions of Tumbridge, who argues that incorporating the provisions of the Directive into UK law for domestic mediation would be beneficial in terms of ensuring that mediation is indeed a confidential process.¹⁵⁴ Given that confidentiality has been shown throughout this work to have immense practical significance, one can only consider such a move to be desirable in ensuring that confidentiality is as successful in practice as it is in mediation theory.¹⁵⁵ Despite the positives here, the public policy exceptions that allow disclosure do remain undefined and may give rise to continued uncertainty¹⁵⁶. However, it does seem that the public policy exceptions articulated in the Directive, set out in Article 7 1(a) as “overriding considerations of public policy”... in particular when required to “ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person” are likely to be narrower than the general ‘interests of justice’ exceptions to without prejudice privilege as operated by the courts. While this may help undergird the process and can certainly be seen as helpful in the context of the Directive’s drive to increase the use of mediation in commercial cross border affairs, as we note above, the need for confidentiality to give way to more pressing policy concerns may become more compelling in other contexts, including but not limited to court connected mediation involving relatively disempowered individuals.

In this sense, one other model that could be followed in respect of mediation more generally is that which applies to the process in the context of family disputes in Scotland. Indeed it is perhaps not that well known across the UK that for family mediation in Scotland, legislative provisions¹⁵⁷ have been in force for some time. This rather short Act applies to all types of family mediation¹⁵⁸ but only with regard to mediation conducted “by a person accredited as a mediator in family mediation to an organisation which is concerned with such mediation and which is approved for the purposes of this Act by the Lord President of the Court of Session”.¹⁵⁹ The central premise of the Act is encapsulated in s 1(1) which holds that “no information as to what occurred during the family mediation to which this Act applies shall be admissible as evidence in any civil proceedings”. Any reference to what

¹⁵² Cross Border Mediation (EU Directive) Regulation 2011 regs 9 & 10.

¹⁵³ In particular CPR Rule 78.26

¹⁵⁴ Tumbridge (n25) 148

¹⁵⁵ D Cornes, ‘Mediation Privilege and the EU Mediation Directive: An Opportunity?’ (2008) *Arbitration* 74(4) 395-405, 395

¹⁵⁶ A further exception under Article 7 1(b) operates “where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement”.

¹⁵⁷ Civil Evidence (Family Mediation) Scotland Act 1995 (c 6).

¹⁵⁸ S 1(2) (a)-(e) including matters affecting the residence, guardianship or welfare of a child or any issues concerning matters arising from breakdown of marriage, civil partnership or cohabitation

¹⁵⁹ S 1.

occurred during family mediation includes a reference to what was said, written or observed during such mediation.¹⁶⁰

Although the wording here thus may seem strong in its defence of confidentiality in mediation, the Act sets out a number of exceptions to this general premise. Prior to examining those exceptions it should also be noted that the Act does not apply to any family mediation in Scotland undertaken by mediators not currently approved by the Lord President.¹⁶¹ As we note above, the issue of defining what type of mediation's undertaken by which mediators is covered by any legislative enacted is a key issue to be resolved in the introduction of confidentiality provisions applying to mediation in a more general context. In terms of the exceptions to the general rule regarding non admissibility, aside from particular caveats that apply to consequent child protection proceedings, further exceptions bear significant similarity with those that might arise under operation of without prejudice rules. They include evidence as to the existence or otherwise of any agreement reached in mediation; in the event of any challenge to a contract forged in mediation, information as to the contract that relates to this challenge; information as to what occurred in the mediation if all parties (except the mediator) agrees to this effect; information arising where proceedings are raised against the mediator or any party at the mediation in respect of damage to property or personal injury allegedly carried out by that person; or information arising out of proceedings arising from the mediation to which the mediator is a party.¹⁶² So while the issue of whether or not disclosures were made in a genuine attempt to settle or not – relevant in the without prejudice privilege - does not bear examination under the Act in determining exceptions to the confidentiality rule and hence can be seen as a boon to the process in terms of providing certainty for parties, there does remain scope for disclosures and documents tendered in mediation to be admissible in consequent litigation in a range of areas.

Finally, while the exception above relating to the 'existence or otherwise of any agreement reached in mediation' may seem uncontroversial and simply following a well founded exception to without prejudice privilege, a recent case exemplifies the uncertainties that can arise in this respect. *FJM v GMC*¹⁶³ involved a married couple with two children who had lived in Australia until their separation. The father petitioned the court under the provisions of the Hague Convention on Abduction that his spouse had unlawfully removed their children to Scotland¹⁶⁴. The wife accepted that she had contravened the terms of the Convention but argued that the petitioner had acquiesced in their removal. More importantly for our purposes, although the mediation could not have been said to have settled all issues between the parties, she argued that he had agreed in their discussions in mediation that the children could remain in Scotland and that he would not invoke his rights seeking the return of the children under the Convention. The father claimed that any such information disclosed in the mediation was not admissible in any subsequent court proceedings by way of s 1 of the Civil Mediation Evidence Act. The petitioner's case fell at the first hurdle as the court held that

¹⁶⁰ S 1(9)

¹⁶¹ Currently this is restricted to mediators operating under the auspices of 'CALM' or Relationships Scotland. In recent years other mediators may now be operating in family matters in Scotland, but do so without the protection of this legislative provision.

¹⁶² S 2

¹⁶³ *FJM v CGM* [2015]CSOH 130

¹⁶⁴ Article 12, Convention on the Civil Aspect of International Child Abduction 1980
<https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>

the Act did not in fact apply to cross border Hague Convention disputes of this nature¹⁶⁵. Although not germane to the decision in the case, Lord Stewart then proceeded to remark *obiter* that even if the legislation did apply it was unlikely that the statements of the petitioner would have been protected given that one of the recognised exceptions in the Act related to “evidence as to the existence or otherwise of any agreement reached in mediation.”¹⁶⁶ The statements regarding the agreement of the petitioner in this sense were recorded in series of emails between the mediator and the parties and in this case recorded in a note of the outcomes by the mediator.¹⁶⁷ This case then highlights the uncertainties that can arise in respect of agreements that might be made by the parties in a complex mediation regarding a range of issues presented that may be disclosed in consequent litigation.

Conclusion

It is clear that confidentiality in mediation is of huge practical significance. Parties may choose to enter mediation on the basis that the process is inherently confidential. Mediation itself may lead to cost savings and more effective solutions to those disputes but its very success may depend in part at least on the confidentiality required to persuade parties to be candid in their negotiations and interaction with the mediator. It is essential then that, subject to necessary qualification, mediation is indeed rendered a confidential process. There is a mismatch between the oft peddled truism that the mediation process is a confidential one and the fact that in reality what confidentiality does in practice arise largely does so through the without prejudice privilege. Moreover, although it is true that the scope of these rules is wide, recent case law suggests that this is the case more in theory than in practice and significant uncertainties abound.

It is, therefore, imperative in our view that the law is reformed to ensure that parties’ expectations in terms of the confidentiality of the mediation process are met. In order to do this, we would argue that the most effective reforms would be to enact provisions which undergirded the mediation process itself with confidentiality as it applies to the admissibility of evidence and compellability of witnesses in any consequent legal proceedings. This is no simple task, however. Choices remain to be made in terms of *how* such provisions should be crafted. The approach taken in respect of the recent European Directive’s implementation for cross border disputes may seem an obvious choice at least in so far as it is bolstered by the CPR rules which ensure that the provisions pertain both to compellability of the mediator *and* admissibility of evidence of materials within his or her control in consequent court proceedings. Moreover, in terms of promoting the sanctity of the process, the exceptions to the rule proscribing admissibility and compellability in the cross border rules, although not articulated clearly, do seem relatively narrow with their emphasis on ‘overriding policy considerations’ of the Member State.¹⁶⁸ By contrast, the approach seen in the Scottish Evidence

¹⁶⁵ The Act is silent on the specific issue of Hague Convention cases. Whether the court’s assertion in this regard is correct or not has been debated since by scholars. Leaving aside that particular point for the time being the case illustrates the problem alluded to above regarding defining in what circumstances a confidentiality provision will apply to a specific mediation. For a discussion see for example, J. Macrae ‘Mediation Minefield’ (2015) *Journal of the Law Society of Scotland* available at <http://www.journalonline.co.uk/Magazine/60-11/1020976.aspx>

¹⁶⁶ S 2.

¹⁶⁷ 133 para 21

¹⁶⁸ Under article 7 of the Directive.

(Family Mediation Scotland) Act 1985 sets out in more detail the exceptions to the general rules around confidentiality and compellability but in so doing are more reflective of extant approaches found in the without prejudice rules and suggest a wider scope for disregarding the central tenets of the provision.

Reflecting the divergences in these approaches, those crafting any general provision applying to confidentiality in mediation in general must grapple with the potential conflict between encouraging mediation through promises of confidentiality, providing certainty in the confidentiality regime and also ensuring that unconscionable conduct which too stringent controls on disclosure would facilitate is not permitted. The latter may be of more import, the more the process is intertwined with the court and/or involving relatively disempowered individuals with limited access to legal advice and assistance, than in the world of private, voluntary commercial mediation involving sophisticated, legally represented participants. This issue is redolent of the fact that mediation is not an homogenous process and one that operates in quite different ways in very different dispute contexts. For example, what may seem appropriate rules of confidentiality in private, high end commercial mediation where sophisticated parties are represented by expert lawyers, may not hold in environments involving relatively disempowered, *pro se* litigants, mediating under the order of a court or as a prerequisite of legal aid.

We saw from discussion of the Scottish Evidence (Family Mediation) (Scotland) Act that it was held in the court¹⁶⁹ that cross border Hague Border disputes were to be excluded from its jurisdiction leaving significant uncertainty. This exemplifies a further issue to be overcome in any drafting. Great care should be taken to define the parameters and reach of the provision. A number of questions arise in enacting any general provision applying to mediation more broadly. Should all forms of mediation including family, consumer, commercial, employment construction etc be included in the reach of any new provision? Could the same set of general rules apply in all these different areas?

Moreover, as we noted above in the Scottish legislation only mediation conducted by approved mediators is covered by the provision. In this respect, any moves to establish confidentiality provisions for mediation more generally may for example require a definition of the terms, 'mediation' and 'mediator' and pose further questions in respect of the current *laissez faire* regulation of mediation which currently subsists in the UK¹⁷⁰. If mediation were to be rendered less porous by statutory intervention it can be argued that mediators governing the process should be more tightly regulated to ensure that malpractice and unfairness in the process is rooted out. More stringent regulation of mediators and prescriptive definitions of mediation are likely to be met with hostility from parts of the mediation community, however.¹⁷¹

While recognising the difficulties above, as a starting point to legislative reform we propose the following. Although it is tempting to argue that the bespoke family regime as regards confidentiality in Scotland be replicated in this dispute area south of the border, on balance it seems more sensible

¹⁶⁹ In *FJM v CGM* [2015]CSOH 130

¹⁷⁰ There are no required regulatory standards for mediators in the UK although various voluntary codes of practice exist eg through the Civil Mediation Council (England and Wales) and Scottish Mediation Network (Scotland).

¹⁷¹ See for example, V. Ramsay 'Mediation 2020: a presentation to the Chartered Institute of Arbitrators' 4th Annual Mediation Symposium, October 19, 2011' (2012) *Arbitration* 78(2):159 For a discussion of mediation regulation more generally see A. Boon *et al* 'Regulating Mediators' (2007) *Legal Ethics* 10: 1

for the sake of cohesion to extend the extant approach applying to cross border disputes in England and Wales coupled with the implementing provisions in the CPR to mediation to domestic mediation – encompassing family mediation and other areas of civil practice encompassed in the Directive. Indeed, the UK is one of only a handful of States that has chosen not to extend the terms of the Directive to domestic disputes. This approach would allow application of the provision to the same wide range of areas that the directive applies to (while dispensing with the limitation to cross border matters) and also adopt the broad definition of ‘mediation’ and ‘mediator’ as set out in the Directive which should aid in limiting definitional problems¹⁷². As noted above, the exceptions to confidentiality espoused in the Directive may be seen as narrow and ill-defined and thus give rise to both uncertainty and concerns over the process not being sufficiently porous. Nonetheless, we would argue that the exceptions carried through as they are in the empowering legislation may be flexible enough to meet the needs of different environments. The difficulties over what may amount to an agreement as seen in *FJM v GMC*¹⁷³ aside, it seems uncontroversial for exceptions to be made as regards determining the existence of any agreement reached in the mediation. Equally we view that the privilege should not be the mediator’s and thus allowing waiving confidentiality where all parties to the mediation agree is in our view the correct approach. The wider exceptions as they pertain to “overriding considerations of public policy”¹⁷⁴ are likely to be construed in a narrow fashion. In a private commercial mediation, for example, where sophisticated parties mediate with lawyers in tow. This should help undergird the process with more certainty thus encouraging further use. The opposite may be true in the court connected environment involving party litigants with no access to legal advice and assistance, perhaps channelled into a process with little choice or understanding of what it will entail where public policy may dictate a more porous process allowing mediation to be opened up to *post-hoc* scrutiny. In this sense while the Directive makes particular reference to limiting confidentiality to “ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person”, these are indicative matters only to which the policy exceptions are not necessarily limited. One could this argue that where more vulnerable parties mediate public policy exceptions could extend to a wider range of matters including alleged misconduct or excessive pressure by a mediator as well as misrepresentation by an opponent.

In terms of the regulation of mediators, while the European Directive allowed extant, market-based approaches to continue (as has occurred in the UK)¹⁷⁵, we would argue that it sensible to continue this approach at least in the short term. While a detailed discussion of mediation regulation is outside the scope of this work, we would note that the circumstances where the need for more stringent regulation becomes more pressing – for example, in the court connected setting involving more vulnerable parties – may be subject to local arrangements, such as court rosters prescribing which mediators can operate in this area and the extent of training and regulatory requirements that should apply to them.

In sum, then while it is our view then that new legislation underpinning confidentiality in mediation is the best way to bridge the gap between theory and practice we recognise that it is no easy task.

¹⁷² European Directive article 1(3)

¹⁷³ *FJM v CGM* [2015]CSOH 130

¹⁷⁴ European Directive article 7(1)(a)

¹⁷⁵ European Directive Recitals, paras 14 and 22.

Our ideas above may represent a launch pad for further discussion and debate. In this sense, borrowing from mediation's book, an optimum approach can only be developed by fostering engagement and meaningful dialogue between mediators and their representational organisations, end users, legal professional bodies and policy makers.

